

being conclusive, and if it appears, *in the transaction itself*, that the executor is about to apply the money raised upon the property of his testator, to objects at variance with his duty as executor, the mere circumstance that the advance of the money was cotemporaneous with the deposit of the securities, will not protect the lender. This was evidently the strong inclination of the mind of Lord Eldon in the case of *McLeod vs. Drummond*, already referred to. His lordship there said, "he should hesitate to say, that as the temptation was so slight, (referring to the ordinary motive with money lenders,) this court would not examine whether that was not a most inequitable transaction with reference to the persons entitled to that property."

And he was manifestly of opinion, concurring with Sir William Grant, Master of the Rolls, in *Hill vs. Simpson*, 7 Ves., 152, that an advance of money, under circumstances which must have apprised the lender that the executor was violating his duty as such, by applying the money to objects not connected with the affairs of his testator, would so completely vitiate the transaction, that an assignment of the assets to secure such advances, would be set aside, in favor of general or residuary legatees. Direct fraud need not be shown: it is sufficient to condemn the transaction, if it appears that the lender of the money must, from the character of the transaction, have known that the executor would misapply it.

This principle is certainly not in opposition to anything said or decided by the Court of Appeals of this state, in the case of *Allender vs. Riston*, 2 Gill & Johns., 86. On the contrary, the authorities which establish it, are cited in terms, from which it may fairly be inferred, that they were approved of, or, at all events, nothing fell from the court, in that case, from which their disapprobation of the doctrine can be deduced.

I take it, therefore, to be established upon authority, and upon reasons which commend themselves to my judgment, that though a person dealing with an executor, may ordinarily repose upon the general presumption that he is acting in the due exercise of his trust; yet when, from the very nature of the transaction, such person must necessarily know that the execu-